Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

FEDERAL HOUSING PARTNERS IV,
an Iowa Limited Partnership, et al.,

Petitioners,

v.

HENRY G. CISNEROS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether or not HUD's implementation of comparability studies without national standards violated Petitioners' rights to procedural due process.

2. Whether Section 801 of the Department of Housing and Urban Development Act of 1989, Pub. 1 No. 101-235, 103 Stat. 2057 violates the doctrine of separation of powers by legislating an exclusive remedy for recovery of past damages.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following were parties to the proceedings in the courts below: UNITED KEETOWAH ASSOCIATES, LTD.; CAPE LACROIX II, A Missouri Limited Partnership; 17th PLACE ASSOCIATES, An Illinois Limited Partnership; CARDINAL APARTMENT, INC.; CRESCENT ARMS ASSOCIATES; NOWATA GARDENS APARTMENT OF CHICKASHA, OKLAHOMA, INC.; WESTERN VILLAGE APARTMENTS, LTD.; FOREST GLEN ESTATES, INC.; CASTLE GARDENS CHARITABLE TRUST; THE ATLANTIS APARTMENT, INC.; CLYDE B. GOLDSMITH; BERNARD L. LIFSHUTZ; SOUTHWOOD PATIO HOMES; FELICIANA, A Louisiana Partnership in Commendam; CONCORDIA LIMITED PARTNERSHIP; ALOUETTE LIMITED PARTNERSHIP; TANGI VILLAGE LIMITED PARTNERSHIP; 3433 TULANE AVENUE, A Louisiana Partnership in Commendam; FOREST TOWERS, OKLAHOMA, a California Non-Profit Corporation; COLLEGE APARTMENTS, INC.; YALE VILLAGE CHARITABLE TRUST; SIERRA MANOR, INC.; SUNSET TOWERS, INC.; HIGHLAND PARK, INC.; GULFWAY TERRACE, INCORPORATED; ROBERT W. GREEN; HOOVER & HOOVER, LTD.; HOOVER DEVELOPMENT, LTD.; BETTER HOUSING INC.; LIPTON PROPERTIES III, LTD.; TOWER OAKS PARTNERSHIP; ROBERT W. PRICE, SR.; TED W. PRICE, SR.; TED W. PRICE, JR.; SASA LIMITED PARTNERSHIP; ALLEN MARKET LANE APARTMENTS ASSOCIATES, A Missouri Limited Partnership; BLAIR SCHOOL APARTMENT ASSOCIATES; HAMILTON

PARTIES TO THE PROCEEDING – Continued

DEVELOPMENT ASSOCIATES; LINDELL PLAZA REDEVELOPMENT CORPORATION; MINERVA PLACE APARTMENTS ASSOCIATES, A Limited Partnership; O'FALLON PLACE LIMITED PARTNERSHIP; O'FALLON PLACE LIMITED PARTNERSHIP, Phase II; O'FALLON PLACE LIMITED PARTNERSHIP, Phase III; REVIVE 103 ASSOCIATES; WEST END APARTMENTS ASSOCIATES; MADISON VILLAGE, LTD.; ARTHUR P. GORMAN; ROBERT H. GARDNER; VICKSBURG VILLAGE LIMITED; ASHLEY HOUSE ASSOCIATES; HYATT MANOR LIMITED; VALLEY HIGH ASSOCIATES; ALGOOD MANOR, LTD.; KANIS PROPERTIES, LTD.; ASHEBORO PROPERTIES, INC.; ATHENS PROPERTIES, LTD.; BON AIR ASSOCIATES; BRIDGE CREEK PROPERTIES, INC.; BROOKSFIELD PROPERTIES, LTD.; CALHOUN PROPERTIES, LTD.; CARTERSVILLE PROPERTIES, INC.; LAKEVIEW PROPERTIES, LTD.; COLUMBIA PROPERTIES, LTD.; CUMBERLAND PROPERTIES, LTD.; DUNLAP PROPERTIES, LTD.; EASTMAN PROPERTIES, INC.; FAYETVILLE PROPERTIES, LTD.; FOREST CREEK PROPERTIES, INC; FORSYTHE PROPERTIES, LTD.; GREENWOOD PROPERTIES, LTD.; LAFOLLETTE PROPERITES, LTD.; LOUDON PROPERITES, LTD; MACON PROPERTIES, LTD.; MANNING PROPERTIES, LTD.; MAULDIN PROPERTIES, LTD.; FITZGERALD HOUSING ASSOC., LTD.; NORTH AUGUST PROPERTIES, LTD.; PARK LAKE PROPERTIES, LTD.; PEBBLEBROOK PROPERTIES, LTD.; PENDLETON PROPERTIES, INC.; PICKENS PROPERTIES, LTD.;

PARTIES TO THE PROCEEDING – Continued

RALEIGH PROPERTIES, LTD.; RICHMOND PROPERTIES, LTD.; RIVERSIDE PROPERTIES, LTD.; IDLEWILD PROPERTIES, LTD.; SENECA PROPERTIES, LTD.; SNEEDVILLE PROPERTIES, LTD.; THOMASTON PROPERTIES, LTD.; WAYNESBORO PROPERTIES, LTD.; WINSTON PROPERTIES, INC.; AZALEA WOODS, LTD.; MARSHALL ARMS ASSOCIATES, LTD.; VIRGIL EISENBIEZ; LYNN OAK COURT COMPANY; CIMARRON GROUP, INC.; EASTBROOK, LTD.; PAYNE LINCOLN PROPERTIES; FOX RIDGE COOPERATIVE TOWNHOUSES, INC.; CODY PLAZA, A Kansas Limited Partnership; SULLIVAN HALL HOUSING PARTNERSHIP, A Missouri Limited Partnership; FRIENDSHIP MAN HOUSING PARTNERSHIP, A Missouri Limited Partnership; MASSEY PARK HOUSING PARTNERSHIP, A Missouri Limited Partnership; NORTHLAWN GARDENS LIMITED DIVIDEND HOUSING ASSOCIATION, A Michigan Limited Partnership; ALABAMA BAPTIST RETIREMENT CENTER, doing business as Clara Verner Towers Apartments; LAKEVIEW APARTMENTS, LTD.; LOGAN APARTMENTS, LTD.; KNIGHTS MANOR, INC.; LESLIE E. SALONE, doing business as Universal Management; CMD ASSOCIATES, Michigan Co-Partnership, doing business as JG Properties; VEARD OTTOWA, INC.; VEARD GASSAWAY, LTD.; HOMES CASES, INC.; WATERSIDE ESTATES; LAKEVIEW ESTATES, LTD.; TERRILL COMMONS, LTD.; VEARD PARSONS, LTD.; RIVER HILL LIMITED; TERRACED PARK LIMITED; PRINCETON PARK APARTMENTS, LTD.; BARRON BUILDERS

PARTIES TO THE PROCEEDING – Continued

AND MANAGEMENT COMPANY; TAVEN APARTMENTS, A Limited Partnership; COLUMBIA APARTMENTS; GARDEN CITY APARTMENTS LIMITED; CENTREX NORTH REDEVELOPMENT CORPORATION; PAUL TIPPS ENTERPRISES #1; HOLDEN HOUSE ASSOCIATES, An Ohio Ltd. Partnership; URGAN PROPERTIES NO. 2, also known as Holt Manor; FAIRWOOD MANOR DEVELOPMENT COMPANY; EAST MALL ASSOCIATES; CASCO ASSOCIATES; URBAN PROPERTIES #1; PAUL TIPPS ENTERPRISES #2; CARPENTER'S ASSOCIATES; PAUL TIPPS ENTERPRISES #4; BELTON GARDEN ASSOCIATES; BALCHERNE ASSOCIATES; ANTHONY ARMS ASSOCIATES; ACADEMY ASSOCIATES; FEDERAL AMERICAN PROPERTIES; LIBERTY PARK DEVELOPMENT COMPANY; LOGAN HILL ASSOC.; MEADOW VILLAGE, LTD.; PARKVIEW PLACE COMPANY; PENN CIRCLE TOWER DEVELOPMENT COMPANY; JASPER HOUSING DEVELOPMENT COMPANY; SAVOY HOOSIER ASSOCIATES; SOUTHERN OAKS APARTMENTS, INC.; BAYTOWN URBAN DEVELOPMENT, LTD; WEYERBACHER TERRACE ASSOCIATES; HENRY FREDRICKS; CANE GARDENS, LTD. PARTNERSHIP; PRINCETON PARK, LTD.; RIVER HILL, LTD.; COUNTRY MEADOWS APARTMENTS; TERRACE PARK, LTD.; F. L. RICHARDS; SANDERS HEIGHTS APTS., An Oklahoma Limited Partnership; VILLAGE DULAC, INC.; NATIONAL CHURCH RESIDENCES OF BUFFALO, NY; NATIONAL CHURCH RESIDENCES OF BALTIMORE; NATIONAL CHURCH RESIDENCES OF MIDDLETOWN; NATIONAL CHURCH RESIDENCES

PARTIES TO THE PROCEEDING – Continued

OF GAHANNA; NATIONAL CHURCH RESIDENCES OF SHARPSBURG, PENNSYLVANIA, INC.; NATIONAL CHURCH RESIDENCES OF CEREDO, WEST VIRGINIA, INC.; NATIONAL CHURCH RESIDENCES OF BRISTOL VILLAGE; WEST VIRGINIA HOMES, INC.; GEORGE MAHARG; JAYCOM CHARITABLE TRUST; ROBERT PESA; PATTERSON APARTMENTS, A Michigan Partnership; BRANCHWOOD ASSOC. OF HARDEEVILLE; BAYTREE ASSOCIATES OF RIDGELAND; CAMBRIDGE ASSOCIATION OF LAMAR; SPRUCE PINES ASSOCIATES OF LANDRUM; TALL PINES ASSOCIATES OF LORIS; WALTERBORO VILLAGE ASSOCIATES; WILLOW OAKS ASSOCIATES OF COWPENS; AMBERLY APARTMENTS ASSOCIATES; EASTPOINTE APARTMENTS ASSOCIATES; ASHWOOD APARTMENTS ASSOCIATES; SOUTHFIELD TOWNHOUSES ASSOCIATES; KETTERING SQUARE APARTMENTS ASSOCIATES; WOODVIEW MANOR ASSOCIATES; SOUTHMOOR ASSOCIATES; LINCOLN HILLS DEVELOPMENT CORPORATION; JOSEPH HERZIG; BARBARA HERZIG; BARTON HOUSE LDHA; ELIZABETH ARMS LIMITED PARTNERSHIP; BROAD RIVER LIMITED PARTNERSHIP; PARKWOOD SOUTH LIMITED PARTNERSHIP; BETHLEHEM VILLAGE LIMITED PARTNERSHIP; PROFIT HILLS LIMITED PARTNERSHIP; WHITNEY YOUNG TERRACE LIMITED PARTNERSHIP; NATIONAL CHURCH RESIDENCES OF CHILLICOTHE, OHIO; ROTH-HELFMAN ASSOCIATES, LTD., A Michigan Partnership.

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For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

The Intervenor Appellants in the case described above petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1-20, is reported at 55 F.3d 362. The opinion of the district court in the case is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 801 of the Department of Housing and Urban Development Reform Act, of 1989, Pub. L. No. 101-235, 103 Stat. 2057 (codified at 42 U.S.C. 1437f(c)(2)(C) (Supp. II 1990) and 42 U.S.C. 1437f(c) note (Supp. II 1990), set forth in appendixes. App., *infra*, 33-34.

STATEMENT

In this case, the Eighth Circuit Court of Appeals rejected the Petitioners' challenges to the validity of Section 801 based on this Court's holding in *Cisneros v. Alpine Ridge Group.*[1]

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[1] *Cisneros v. Alpine Ridge Group*, 113 S. Ct. 1898 (1993).

1. Background. In 1974, Congress added the Section 8 program to the Housing Act of 1937 (Act). See 42 U.S.C. 1437f. The Section 8 program provides federally subsidized housing to low-income tenants by authorizing the payment of rent subsidies to landlords participating in the "Section 8 program." Under the Section 8 program, the federal government makes assistance payments to the project owners to bring rents up to a level which justified the landlord's participation in the Section 8 project from an economic perspective.

As participants in the Section 8 program, individual project owners, such as the Petitioners herein, entered into long-term contracts with HUD known as "housing assistance payment contracts" or "HAP" contracts.

The Housing Act, 42 U.S.C. 1437f(c)(2)(A) and (C) (1982) authorizes the assistance contracts to provide for annual rent adjustments on the basis of a reasonable formula. Pursuant to that statutory authority, the HAP contracts entered into by Petitioners contained the following agreement:

> "b. Automatic Annual Adjustments
>
> (1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. **Such factors and the basis for their determination will be published in the Federal Register * * * .**
>
> (2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be

> adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract."[2]

In the early 1980's, HUD began to suspect that some landlords under the Section 8 program were receiving rents above the prevailing market rates for comparable housing. HUD then began to conduct independent "comparability studies" in certain real estate markets to determine if subsidized rents were out of line with market rents. In those instances where HUD concluded that subsidized rents were in excess of private market rents, HUD used these comparability studies to impose caps or limitations upon subsidized rent payments under the Section 8 contracts. Prior to and during the use of such comparability studies, no policies or procedures were established by HUD advising Petitioners and other project owners of the methodology used by HUD in conducting and implementing the results of the comparability studies.

On suit brought by several landlords challenging HUD's right to cap subsidized rents by the use of comparability studies, the Ninth Circuit Court of Appeals in *Rainier View Assocs. v. United States Dep't of Housing & Urban Dev.*,[3] ruled that HUD could not limit automatic annual increases provided in Section 8 contracts by means of a market survey or comparability studies.

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[2] HAP Contract, §1.9b.

[3] *Rainier View Assocs. v. United States Dep't of Housing & Urban Dev.*, 848 F.2d 988 (9th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989).

Unhappy with the results of the *Rainier View* decision, HUD announced its intention not to obey the Ninth Circuit's decision for its contracts outside the Ninth Circuit. Faced with the possibility of additional litigation and a multitude of adverse judgments against HUD, Congress attempted to fix the problem by amending the Housing Act in 1989.

In 1989 Congress enacted Section 801 of the Department of Housing and Urban Development Reform Act (Reform Act), 103 Stat. 2057, amending Section 8(c)(2)(C) of the Housing Act to provide explicitly that HUD may limit automatic rent adjustments in the future through the use of independent comparability studies.

In Section 801, Congress also legislated a settlement of existing and future damage lawsuits against HUD based upon the previous inappropriate use of comparability studies by providing for a partial retroactive rent increase of thirty percent (30%) for lost rent attributable to comparability studies.

On Writ of Certiorari in consolidated separate actions arising in the United States District Court for the Western District of Washington,[4] and in the United States District Court for the Central District of California,[5] this Court in the case of *Cisneros v. Alpine Ridge Group*,[6] held that the HAP contracts did not prohibit use of comparability

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[4] *Alpine Ridge Group, et al. v. Kemp*, 764 F. Supp. 1393 (W.D., Wash. 1990).

[5] *Acacia Villa, et al. v. Kemp*, 774 F. Supp. 1240 (C.D. Cal. 1990).

[6] *Alpine Ridge Group*, 113 S. Ct. 1898 (1993).

studies to impose caps on formula based rent adjustments because the project owners did not have vested rights to such annual automatic rent increases.

Significantly, in the *Alpine Ridge* decision, the Court did not reach the constitutional issues raised, finding it unnecessary to do so because its ruling was based on the language used by the parties in the HAP contracts. In this case, the Eighth Circuit erroneously concluded that this Court had previously resolved the procedural due process and constitutional issues being raised by the Petitioners herein and summarily rejected the challenges to Section 801.

A. The Statute At Issue In This Case

The statute at issue in this case is Section 801 of the Department of Housing and Urban Development Reform Act of 1989 (Appendix E).

REASONS FOR GRANTING THE PETITION

I. PROCEDURAL DUE PROCESS VIOLATIONS

The Petition should be granted because HUD's implementation of comparability studies in the 1980's without ascertainable nationwide standards for their implementation violated fundamental due process principles.

The District Court in the Eighth Circuit in this case assumed that the decision in *Cisneros v. Alpine Ridge*

Group[7] resolved this issue. It did not. In fact, the Court made this clear in its opinion by stating:

> "The integrity with which the agency has carried out its comparability studies is an entirely separate matter from its contractual authority to employ such studies at all."[8]

In the *Alpine Ridge* decision, HUD acknowledged that HUD's comparability process must be fair and accurate and satisfy the requirements of administrative reasonableness.[9] Despite this, the Court has not yet addressed HUD's actual methodology for implementing comparability studies nor the issue of the lack of established nationwide standards during the implementation of comparability studies.

Written, objective, and ascertainable standards is an elementary and intrinsic part of due process.[10] Procedural due process requires that agency administrators in exercising their discretion be controlled by procedural and substantive standards. See *Historic Greensprings, Inc. v. Bergland*.[11]

Courts throughout the nation have found in analogous circumstances that procedural due process requires definite ascertainable standards. In the case of *Holmes v.*

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[7] 113 S. Ct. 1898 (1993).

[8] *Id.* at 1904.

[9] *Id.*, n.3.

[10] *Baker-Chaput v. Cammett*, 406 F. Supp. 1134 (D.N.H. 1976).

[11] *Historic Greensprings, Inc. v. Bergland*, 497 F. Supp. 839, 856 (E.D. Va. 1980), vacated as moot, 12 Envtl. L. Rep. 20, 100 (Ed. Va. 1981).

New York City Housing Authority,[12] the housing authority failed to process housing applications in a systematic way resulting in applications going unconsidered, determinations of eligibility not being reported to applicants and decisions unsupported by ascertainable reasons. The court in *Holmes* held that due process required that selections among applicants be made in accordance with ascertainable standards.[13]

In *Baker-Chaput v. Cammett,*[14] the court held that basic due process required an administrator of the state's welfare program to prepare ascertainable standards to guide its decisions. The court stated:

> "The standardless administration of general assistance places the hungry and poor at the administrator's whim . . . I rule that the establishment of written, objective and ascertainable standards is an elementary and intrinsic part of due process.[15]

The fact that HUD did not have nationwide standards governing the implementation of comparability studies is beyond dispute. It was noted in Congress in 1987 that:

> "HUD field offices have been making capricious individualized rent reductions nonetheless. Further, such reductions and other rent limitations have been made on ad hoc and arbitrary basis in

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[12] *Holmes v. New York City Housing Authority,* 398 F.2d 262 (2nd Cir. 1968).

[13] *Id.* at 265.

[14] *Baker-Chaput,* 406 F. Supp. 1134 (D.N.H. 1976).

[15] *Id.* at 1139.

> the absence of published procedures that could assure a consistent policy."[16]

Before 1985, HUD's field offices had absolutely no standards to guide them in conducting the comparability studies that they were using to cut project owners' rents. Between 1985 and 1986, HUD issued a few memoranda regarding comparability, but HUD's few memoranda regarding the subject was an attempt to make whole cloth out of what amounts to a pile of threads.

HUD's use of comparability studies has always included a procedural due process issue. HUD created this issue by selectively departing from its use of the published Automatic Annual Adjustment Factors through the use of comparability studies. HUD created the due process issue by failing to enact published procedures that would assure a consistent policy for the utilization of comparability studies. As a result, the Petitioners were subjected to comparisons made on an ad hoc and arbitrary basis. This fundamental due process issue was not resolved by the court in *Alpine Ridge Group*[17] nor by the Eighth Circuit in this opinion, which compels this Court to grant the Petition and review HUD's conduct in light of fundamental procedural due process considerations.

II. SECTION 801 VIOLATES SEPARATION OF POWERS DOCTRINE

The Petition should be granted to provide review of the issue of whether Congress violated the separation of

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[16] H. R. Rep. No. 122, 100th Cong. 1st Sess., 1987.

[17] *Alpine Ridge Group*, 113 S. Ct. 1898.

powers doctrine by legislating an exclusive remedy for pending and potential litigation against HUD arising from HUD's misuse of comparability studies prior to the passage of Section 801. The record is clear that the genesis for the enactment of Section 801 was the *Rainier View*[18] decision in the Ninth Circuit Court of Appeals which was adverse to HUD:

> "*Senator Sasser* (Chairman Budget Committee):
>
> At the outset, I would like to offer my congratulations to the chairman for addressing the very complex situation surrounding the Rainier View decision. Indeed, by moving quickly to enact this legislation with its Rainier View 'fix' we could save the Government hundreds of millions, if not more than a billion dollars."[19]

HUD and Congress feared an avalanche of litigation and a multitude of verdicts against HUD which, by Congress' own estimates, ranged in the neighborhood of two billion dollars:

> "*Secretary Kemp* (in letter to Congress):
>
> Although the final bill does impose a greater retroactive settlement cost than I had proposed, it does provide the essential legislative relief to avoid a potential loss of $2 billion at a cost of less than $250 million."[20]
>
> "*Senator Cranston* (Chairman Housing Subcommittee):

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[18] *Ranier View*, 848 F.2d 988.

[19] Cong. Rec. S 16600 (Nov. 21, 1989).

[20] Cong. Rec. H 9688 (Nov. 21, 1989).

> The Administration placed the cost of compliance with the Court of Appeals' decision at $600 million to $1 billion. The Administration estimates that the cost of this retroactive solution is $210 million nationwide."[21]
>
> "*Senator D'Amato* (Ranking Minority Member, Housing Subcommittee and Co-sponsor of Bill):
>
> The provision in this bill reduced this loss to $210 million – a savings of over $390 million."[22]
>
> "*Representative Gonzalez* (Chairman Housing Subcommittee):
>
> The resolution would reduce retroactive costs to $210 million and reduce prospective costs to $500 million over 10 years."[23]
>
> "*Representative Wylie* (Ranking Minority member, Housing Subcommittee):
>
> These issues include a provision regarding the methodology for HUD to use in determining Section 8 project rent adjustments made necessary by the *Ranier View* court decision . . . It too will produce substantial reductions in costs estimated by HUD to be as high as $700 to $800 million."[24]

Section 801 explicitly recognized that HUD had mishandled and misapplied comparability studies during the 80's in its zealous effort to cap Section 8 contract rent increases. Congress, in Section 801, decided that it would

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[21] Cong. Rec. S 16000 (Nov. 21, 1989).

[22] Cong. Rec. S 16602 (Nov. 21, 1989).

[23] Cong. Rec. H 9686 (Nov. 21, 1989).

[24] Cong. Rec. H 9690 (Nov. 21, 1989).

deal with the issue of pending and future litigation over HUD's use of comparability studies by simply mandating a partial settlement and forcing that settlement upon project owners, including Petitioners and those similarly situated. In Section 801, Congress prescribed that all such disputes would be resolved by allowing the project owners to receive a thirty percent (30%) retroactive rent increase, and no other or further remedy. Thus, Congress legislated the outcome of all pending and future litigation on terms desirable to itself and capped its own losses at thirty percent retroactive rent increases for those project owners astute enough to accomplish all time, legal and procedural hurdles set forth to enable them to claim and receive the thirty percent retroactive rent increase.

Congress, by enacting Section 801 of the Reform Act of 1989, exceeded the powers granted to it by the Constitution. Section 801 provides that:

> "The method provided by this subsection shall be the *exclusive method* by which retroactive payments, whether or not requested, may be made for the project subject to this subsection before the fiscal year 1980 until the regulations issued under subsection (e) take effect."

Congress did not have the power to make Section 801 the exclusive remedy for claims against HUD arising from the dispute over the use of comparability studies to limit HAP contract rents.

The federal courts are courts of limited jurisdiction. Cf, *Marburry v. Madison*.[25] It is well established that Congress, having created the inferior federal courts may limit their jurisdiction in accordance with the "exceptions" clause.[26] What Congress cannot do and what it attempted to do by enacting Section 801 is to use its powers under the "exceptions clause" to limit the jurisdiction of federal courts in order to have cases decided in favor of the government. See *United States v. Klein*.[27] In *Klein*, the government was faced with a similar situation whereby Congress passed legislation to avoid paying substantial claims against it. The Court ruled the law unconstitutional because it violated the separation of powers doctrine.[28] The Chief Justice, writing for the Court, stated that:

> "We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power."[29]

In *Klein*, Congress usurped the power of the judiciary by exceeding its legislative mandate. Here, by the passage of Section 801, Congress also usurped the power of the judiciary by resolving all pending and future litigation against HUD based on the use of comparability studies and prescribing the exact outcome resolution and the exclusive remedy for any such disputes, thereby removing such disputes from the proper jurisdiction of

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[25] *Marburry v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

[26] See Article 3, Section 1.

[27] *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1872).

[28] *Id.*

[29] *Id.*

the federal courts on a case-by-case basis. Unlike *Klein*, by the passage of Section 801 there is no doubt that Congress' usurpation of the power of judiciary was *intentional*. In *Klein*, the Supreme Court gave Congress the benefit of the doubt and assumed that its usurpation of judicial power was inadvertent. Here, Congress expressly recognized that HUD had improperly administered the Section 8 program in the area of comparability studies and specifically set out to create a "fix" for the *Rainier View*[30] problem.

Justice White, writing for the majority, described Congress' actions pursuant to Section 801 as:

> "In an apparent compromise, however, the same section also sought to restore to Section 8 project owners a portion of the automatic rent adjustments they had been denied through the use of comparability studies prior to the enactment of the 1989 amendments. The amendments thus offered Section 8 project owners *a partial retroactive remedy for lost* rent attributable to comparability studies."[31]

Congress was worried about the cost of litigation resulting from HUD's mishandling of comparability studies. Section 801 was enacted in order to save the government money resulting from awards against the government due to HUD's misuse of comparability studies. The exclusive remedy forced upon Petitioners in Section 801 was an expressly intentional act, violating the separation of powers doctrine.

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[30] *Rainier View*, 848 F.2d 988.

[31] *Alpine Ridge Group*, 113 S. Ct. at 1901 [emphasis added].

In *United States v. Klein*,[32] in finding the acts of Congress an inappropriate usurpation of the role of the judiciary, this Court considered the subject legislation in light of the following:

> "What is this but to prescribe a rule for the decision of a cause in a particular way? . . . and can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision through the judicial department of the government in cases pending before it? We think not. . . . "[33]

The valid questions asked by this Court in *United States v. Klein*[34] result in proper grounds for this Court to review the Eighth Circuit's opinion in this case.

CONCLUSION

HUD's use of comparability studies in the 1980's was a classic example of an unchecked bureaucracy. No standards, rules or procedures were established by HUD to allow aggrieved project owners to ascertain if their rent reductions were being imposed fairly by HUD regional offices. Local HUD offices used comparability studies to lower contract rents in a game without rules. HUD's exercise of unfettered discretion in conducting comparability studies without rules, guidelines or standards violated basic concepts of fairness and contravened the

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[32] *Klein*, 80 U.S. (13 Wall.) 128, 146 (1872).

[33] *Id.*

[34] *Id.*

Petitioners' rights to procedural due process. The Petition should be granted to review HUD's conduct in light of accepted standards of due process and administrative fairness.

By enacting Section 801, Congress legislated the decision of all causes regarding HUD's administration of comparability studies in a particular way. The particular way chosen by Congress was to ratify comparability studies previously performed to limit the recovery of damages by any project owner to a thirty percent (30%) retroactive rent increase.

By Section 801, Congress allowed one party to the controversy (the government) to decide the resolution of all independent controversies in its favor. Congress decided that it would win the dispute by offering all aggrieved project owners a thirty percent (30%) retroactive rent increase as full settlement. Clearly, by the passage of Section 801, Congress prescribed its own rule of decision for the comparability studies conflict and dictated that rule of decision to all project owners, removing any such power from the judiciary.

Neither this Court nor any other court considering this dispute, has ruled upon the constitutionality of Section 801 in the context of separation of powers. To grant the Petition in this case would given this Court an opportunity to reaffirm the important concepts embodied in *United States v. Klein*[35] wherein the separation of powers

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[35] *Id.*

doctrine was given its intended effect and an inappropriate usurpation of judicial power was struck down. As the court stated in *Klein*:

> "It is of vital importance that these powers be kept distinct. The constitution provides that the judicial power of the United States shall be vested in one supreme court and such inferior courts as Congress from time to time shall ordain and establish."[36]

Therefore, the Eighth Circuit's decision in this case should be reviewed by granting the Petition requested herein.

LARRY DERRYBERRY,
DERRYBERRY, QUIGLEY, SOLOMON
BLANKENSHIP & NAIFEH
4800 N. Lincoln Boulevard
Oklahoma City, Oklahoma 73105
(405) 528-6569

Attorney for Petitioners

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[36] *Id.* at 47.

APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 94-1416

FEDERAL HOUSING PARTNERS IV, an Iowa Limited Partnership; SUNFLOWER PLAZA TOWER COMPANY, A Kansas Corporation; RIDGEWAY ASSOCIATES, An Iowa Limited Partnership; WATERLOO PROPERTIES, an Iowa Limited Partnership; CEDAR FALLS ASSOCIATES, An Iowa Limited Partnership; CROSSROADS PROPERTIES, An Iowa Limited Partnership; FEDERAL HOUSING PARTNERS II, An Iowa Limited Partnership; CHAMBER OF COMMERCE of Sioux City, Iowa, An Iowa Non-Profit Corporation; GOODWILL INDUSTRIES of Sioux City, An Iowa Non-Profit Corporation; KLINGER PROPERTIES, INC., An Iowa Corporation; EDMOND J. NAUENBURG; BETTY L. NAUENBURG; BUFFALO ASSOCIATES, A Minnesota	* * *

Partnership; PLANNED *
INVESTMENT 83-1, A *
Minnesota General *
Partnership; PLANNED *
INVESTMENT 84-1, A *
Minnesota General *
Partnership; PLANNED *
INVESTMENT 86-1, a *
Minnesota General *
Partnership; PLANNED *
INVESTMENT 86-2, a *
Minnesota Partnership; *
PLANNED INVESTMENT *
85-2, Ivanhoe, a Minnesota *
Limited Partnership; *
PLANNED INVESTMENT *
85-1, Liechfield, A Minnesota *
Limited Partnership; M. F. *
HENDRICKS; HYDE PARK *
HOUSING PARTNERSHIP, A *
Missouri Limited Partnership; *
ANGELINE ST. MARY'S *
PARTNERS, An Iowa Limited *
Partnership; ERNEST J. *
GREGOIRE; PRAIRIE VIEW *
ASSOCIATES, A North Dakota *
Partnership; PRAIRIE VIEW II, *
A North Dakota Limited *
Partnership; JERRY L. MEIDE; *
JAMESTOWN PLUMBING *
AND HEATING, A North *
Dakota Corporation; WARREN *
GALLAGHER; LOIS *
GALLAGHER; FRANK *
GALLAGHER; ELEANOR *
GALLAGHER; MICHAEL *
GALLAGHER; MARLYS *
GALLAGHER; FRANK W. *
*

GALLAGHER; ARBOR TERRACE APARTMENTS, LTD., An Iowa Limited Partnership; THE MEADOW APARTMENTS, LTD., An Iowa Limited Partnership; REGENCY FIVE APARTMENTS, A Iowa Partnership; BERGANGREEN APARTMENTS, LTD., An Iowa Limited Partnership; PIONEER HOUSE, LTD., A Missouri Limited Partnership; OAKWOOD TERRACE, LTD., A Missouri Limited Partnership; NORTH VALLEY TOWNHOMES, LTD., A Missouri Limited Partnership; GREEN OAKS ESTATES, LTD., A Missouri Limited Partnership; COLUMBIA SQUARE EAST; COLUMBIA SQUARE SOUTH; UNIVERSITY SQUARE; LANE APARTMENTS, LTD., A Missouri Limited Partnership; BRANSON MANOR, LTD., A Missouri Limited Partnership; BROOKFIELD VILLAGE, LTD., A Missouri Limited Partnership; PRINCETON MANOR, LTD., A Missouri Limited Partnership; PRAIRIE PLAINS, LTD., A Missouri Limited Partnership; WILLOW CREEK, LTD., A Missouri Limited Partnership;

COUNTRYCLUB TOWER, L.P., *
A Kansas Limited Partnership; *
ELDON PROPERTIES, LTD., a *
Missouri Limited Partnership; *
HIGHLAND MEADOWS OF *
KANSAS, L.P., A Kansas *
Limited Partnership; *
CRESTVIEW VILLAGE, LTD., *
A Missouri Limited *
Partnership; AUTUMN PARK *
OF CHEROKEE, An Iowa *
Corporation; AUTUMN PARK *
OF IOWA CITY, An Iowa *
Partnership; AUTUMN PARK *
OF CHARTON, An Iowa *
Partnership; AUTUMN PARK *
OF WASHINGTON, An Iowa *
Limited Partnership; VALLEY *
VIEW OF CHEROKEE, An *
Iowa Partnership; PRAIRIE *
VIEW TOWNHOMES OF *
NORTH PLATTE, LTD., A *
Nebraska Limited Partnership; *
VALLEY VIEW OF SPIRIT *
LAKE, An Iowa Partnership; *
PLATTEVIEW ASSOCIATES, A *
Nebraska Partnership; *
AUTUMN PARK OF *
SHELDON, An Iowa *
Partnership; AUTUMN PARK; *
AUTUMN PARK OF SOUTH *
SIOUX CITY, A Nebraska *
Partnership; AUTUMN PARK *
OF HASTINGS, A Nebraska *
Partnership; AUTUMN PARK *
OF MASON CITY, An Iowa *
Partnership; MCPHERSON *
*

APARTMENTS COMPANY, A Kansas Corporation; SHADYWAY PLAZA COMPANY, A Kansas Corporation; WEST PARK TOWER COMPANY, A Kansas Corporation; SUNFLOWER PLAZA TOWER COMPANY, A Kansas Corporation; SUMMERSET PLAZA TOWER COMPANY, A Kansas Corporation; PRAIRIE VILLA COMPANY, A Kansas Corporation; PEACHTREE PLAZA TOWER COMPANY, A Kansas Corporation; PARK PLAZA TOWER COMPANY, A Kansas Corporation; GORDY SQUARE APARTMENTS COMPANY, A Kansas Corporation; HERITAGE HOUSE APARTMENTS COMPANY, A Kansas Corporation,

Plaintiffs-Appellants,

UNITED KEETOWAH ASSOCIATES, LTD.; CAPE LACROIX II, A Missouri Limited Partnership; 17TH PLACE ASSOCIATES, An Illinois Limited Partnership; CARDINAL APARTMENT, INC.; CRESCENT ARMS ASSOCIATES; NOWATA GARDENS APARTMENT OF CHICKASHA, OKLAHOMA,

INC.; WESTERN VILLAGE *
APARTMENTS, LTD.; FOREST *
GLEN ESTATES, INC.; *
CASTLE GARDENS *
CHARITABLE TRUST; THE *
ATLANTIS APARTMENT, *
INC.; CLYDE B. GOLDSMITH; *
BERNARD L. LIFSHUTZ; *
SOUTHWOOD PATIO *
HOMES; FELICIANA, A *
Louisiana Partnership in *
Commendam; CONCORDIA *
LIMITED PARTNERSHIP; *
ALOUETTE LIMITED *
PARTNERSHIP; TANGI *
VILLAGE LIMITED *
PARTNERSHIP; 3433 TULANE *
AVENUE, A Louisiana *
Partnership in Commendam; *
FOREST TOWERS, *
OKLAHOMA, a California *
Non-Profit Corporation; *
COLLEGE APARTMENTS, *
INC.; YALE VILLAGE *
CHARITABLE TRUST; SIERRA *
MANOR, INC.; SUNSET *
TOWERS, INC.; HIGHLAND *
PARK, INC.; GULFWAY *
TERRACE, INCORPORATED; *
ROBERT W. GREEN; HOOVER *
& HOOVER, LTD.; HOOVER *
DEVELOPMENT, LTD.; *
BETTER HOUSING, INC.; *
LIPTON PROPERTIES III, *
LTD.; TOWER OAKS *
PARTNERSHIP; ROBERT W. *
PRICE, SR.; TED W. PRICE, *
*

SR.; TED W. PRICE, JR.; SASA *
LIMITED PARTNERSHIP; *
ALLEN MARKET LANE *
APARTMENTS ASSOCIATES, *
A Missouri Limited *
Partnership; BLAIR SCHOOL *
APARTMENT ASSOCIATES; *
HAMILTON DEVELOPMENT *
ASSOCIATES; HAMILTON *
DEVELOPMENT ASSOCIATES; *
LINDELL PLAZA *
REDEVELOPMENT *
CORPORATION; MINERVA *
PLACE APARTMENTS *
ASSOCIATES, A Limited *
Partnership; O'FALLON *
PLACE LIMITED *
PARTNERSHIP; O'FALLON *
PLACE LIMITED *
PARTNERSHIP, Phase II; *
O'FALLON PLACE LIMITED *
PARTNERSHIP, Phase III; *
REVIVE 103 ASSOCIATES; *
WEST END APARTMENTS *
ASSOCIATES; MADISON *
VILLAGE, LTD.; ARTHUR P. *
GORMAN; ROBERT H. *
GARDNER; VICKSBURG *
VILLAGE LIMITED; ASHLEY *
HOUSE ASSOCIATES; HYATT *
MANOR LIMITED; VALLEY *
HIGH ASSOCIATES; ALGOOD *
MANOR, LTD.; KANIS *
PROPERTIES, LTD.; *
ASHEBORO PROPERTIES, *
INC.; ATHENS PROPERTIES, *
LTD.; BON AIR ASSOCIATES; *
*

BRIDGE CREEK PROPERTIES, *
INC.; BROOKSFIELD *
PROPERTIES, LTD.; *
CALHOUN PROPERTIES, *
LTD.; CARTERSVILLE *
PROPERTIES, INC.; *
LAKEVIEW PROPERTIES, *
LTD.; COLUMBIA *
PROPERTIES, LTD.; *
CUMBERLAND PROPERTIES, *
LTD.; DUNLAP PROPERTIES, *
LTD.; EASTMAN *
PROPERTIES, INC.; *
FAYETTEVILLE PROPERTIES; *
LTD.; FOREST CREEK *
PROPERTIES, INC.; *
FORSYTHE PROPERTIES, *
LTD.; GREENWOOD *
PROPERTIES, LTD.; *
LAFOLLETTE PROPERTIES, *
LTD.; LOUDON PROPERTIES, *
LTD.; MACON PROPERTIES, *
LTD.; MANNING *
PROPERTIES, LTD.; *
MAULDIN PROPERTIES, *
LTD.; FITZGERALD HOUSING *
ASSOC., LTD.; NORTH *
AUGUST PROPERTIES, LTD.; *
PARK LAKE PROPERTIES, *
LTD.; PEBBLEBROOK *
PROPERTIES, LTD.; *
PENDLETON PROPERTIES, *
INC.; PICKENS PROPERTIES, *
LTD.; RALEIGH PROPERTIES, *
LTD.; RICHMOND *
PROPERTIES, LTD.; *
RIVERSIDE PROPERTIES, *
*

LTD.; IDLEWILD *
PROPERTIES, LTD.; SENECA *
PROPERTIES, LTD.; *
SNEEDVILLE PROPERTIES, *
LTD.; THOMASTON *
PROPERTIES, LTD.; *
WAYNESBORO PROPERTIES, *
LTD.; WINSTON PROPERTIES, *
INC.; AZALEA WOODS, LTD.; *
MARSHALL ARMS *
ASSOCIATES, LTD.; VIRGIL *
EISENBIEZ; LYNN OAK *
COURT COMPANY; *
CIMARRON GROUP, INC.; *
EASTBROOK, LTD.; PAYNE *
LINCOLN PROPERTIES; FOX *
RIDGE COOPERATIVE *
TOWNHOUSES, INC.; CODY *
PLAZA, A Kansas Limited *
Partnership; SULLIVAN HALL *
HOUSING PARTNERSHIP, A *
Missouri Limited Partnership; *
FRIENDSHIP MAN HOUSING *
PARTNERSHIP, A Missouri *
Limited Partnership; MASSEY *
PARK HOUSING *
PARTNERSHIP, A Missouri *
Limited Partnership; *
NORTHLAWN GARDENS *
LIMITED DIVIDEND *
HOUSING ASSOCIATION, A *
Michigan Limited Partnership; *
ALABAMA BAPTIST *
RETIREMENT CENTER, doing *
business as Clara Verner *
Towers Apartments; *
LAKEVIEW APARTMENTS, *
*

LTD.; LOGAN APARTMENTS, *
LTD.; KNIGHTS MANOR, *
INC.; LESLIE E. SALONE, *
doing business as Universal *
Management; CMD *
ASSOCIATES, Michigan Co- *
Partnership, doing business as *
JG Properties; VEARD *
OTTOWA, INC.; VEARD *
GASSAWAY, LTD.; HOMES *
CASES, INC.; WATERSIDE *
ESTATES; LAKEVIEW *
ESTATES, LTD.; TERRILL *
COMMONS, LTD.; VEARD *
PARSONS, LTD.; RIVER HILL *
LIMITED; TERRACED PARK *
LIMITED; PRINCETON PARK *
APARTMENTS, LTD.; *
BARRON BUILDERS AND *
MANAGEMENT COMPANY; *
TAVEN APARTMENTS, A *
Limited Partnership; *
COLUMBIA APARTMENTS; *
GARDEN CITY APARTMENTS *
LIMITED; CENTREX NORTH *
REDEVELOPMENT *
CORPORATION; PAUL TIPPS *
ENTERPRISES #1; HOLDEN *
HOUSE ASSOCIATES, An *
Ohio Ltd. Partnership; URBAN *
PROPERTIES NO. 2, also *
known as Holt Manor; *
FAIRWOOD MANOR *
DEVELOPMENT COMPANY; *
EAST MALL ASSOCIATES; *
CASCO ASSOCIATES; URBAN *
PROPERTIES #1; PAUL TIPPS *
*

ENTERPRISES #2; *
CARPENTER'S ASSOCIATES; *
PAUL TIPPS ENTERPRISES *
#4; BELTON GARDEN *
ASSOCIATES; BLACHERNE *
ASSOCIATES; ANTHONY *
ARMS ASSOCIATES; *
ACADEMY ASSOCIATES; *
FEDERAL AMERICAN *
PROPERTIES; LIBERTY PARK *
DEVELOPMENT COMPANY; *
LOGAN HILL ASSOC.; *
MEADOW VILLAGE, LTD.; *
PARKVIEW PLACE *
COMPANY; PENN CIRCLE *
TOWER DEVELOPMENT *
COMPANY; JASPER *
HOUSING DEVELOPMENT *
COMPANY; SAVOY HOOSIER *
ASSOCIATES; SOUTHERN *
OAKS APARTMENTS, INC.; *
BAYTOWN URBAN *
DEVELOPMENT, LTD.; *
WEYERBACHER TERRACE *
ASSOCIATES; HENRY *
FREDRICKS; CANE GARDENS *
LTD. PARTNERSHIP; *
PRINCETON PARK, LTD.; *
RIVER HILL, LTD.; COUNTRY *
MEADOWS APARTMENTS; *
TERRACE PARK, LTD.; F. L. *
RICHARDS; SANDERS *
HEIGHTS APTS., An *
Oklahoma Limited Partnership; *
VILLAGE DULAC, INC.; *
NATIONAL CHURCH *
RESIDENCES OF BUFFALO, *
*

NY; NATIONAL CHURCH *
RESIDENCES OF BALTIMORE; *
NATIONAL CHURCH *
RESIDENCES OF *
MIDDLETOWN; NATIONAL *
CHURCH RESIDENCES OF *
GAHANNA; NATIONAL *
CHURCH RESIDENCES OF *
SHARPSBURG, *
PENNSYLVANIA, INC.; *
NATIONAL CHURCH *
RESIDENCES OF CEREDO, *
WEST VIRGINIA, INC.; *
NATIONAL CHURCH *
RESIDENCES OF BRISTOL *
VILLAGE; WEST VIRGINIA *
HOMES, INC.; GEORGE *
MAHARG; JAYCOM *
CHARITABLE TRUST; *
ROBERT PESA; PATTERSON *
APARTMENTS, A Michigan *
Partnership; BRANCHWOOD *
ASSOC. OF HARDEEVILLE; *
BAYTREE ASSOCIATES OF *
RIDGELAND; CAMBRIDGE *
ASSOCIATION OF LAMAR; *
SPRUCE PINES ASSOCIATES *
OF LANDRUM; TALL PINES *
ASSOCIATES OF LORIS; *
WALTERBORO VILLAGE *
ASSOCIATES; WILLOW OAKS *
ASSOCIATES OF COWPENS; *
AMBERLY APARTMENTS *
ASSOCIATES; EASTPOINTE *
APARTMENTS ASSOCIATES; *
ASHWOOD APARTMENTS *
ASSOCIATES; SOUTHFIELD *
*

TOWNHOUSES ASSOCIATES; KETTERING SQUARE APARTMENTS ASSOCIATES; WOODVIEW MANOR ASSOCIATES; SOUTHMOOR ASSOCIATES; LINCOLN HILLS DEVELOPMENT CORPORATION; JOSEPH HERZIG; BARBARA HERZIG; BARTON HOUSE LDHA; ELIZABETH ARMS LIMITED PARTNERSHIP; BROAD RIVER LIMITED PARTNERSHIP; PARKWOOD SOUTH LIMITED PARTNERSHIP; BETHLEHEM VILLAGE LIMITED PARTNERSHIP; PROFIT HILLS LIMITED PARTNERSHIP; WHITNEY YOUNG TERRACE LIMITED PARTNERSHIP; NATIONAL CHURCH RESIDENCES OF CHILLICOTHE, OHIO; ROTH-HELFMAN ASSOCIATES, LTD., A Michigan Partnership,

Intervenors-Appellants,

v.

HENRY G. CISNEROS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Defendant-Appellee.

Submitted: November 17, 1994

Filed: May 12, 1995

Before BEAM, Circuit Judge, CAMPBELL,* Senior Circuit Judge, and MORRIS SHEPPARD ARNOLD, Circuit Judge.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

The issue in this action is whether landlords to whom the government paid subsidies were entitled to automatic rental adjustments, even if market studies showed that such adjustments resulted in rents higher than those in the local market. In light of *Cisneros v. Alpine Ridge Group*, 113 S. Ct. 1898, 123 L. Ed.2d 572 (1993), we conclude that they are not so entitled and affirm the district court.[1]

I.

Congress created the Section 8 housing program in 1974 to subsidize landlords who accept low-income tenants. Tenants made rental payments based on their income and ability to pay, and HUD then made assistance

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* The HONORABLE LEVIN H. CAMPBELL, Senior United States Circuit Judge for the First Circuit Court of Appeals, sitting by designation.

[1] The Honorable William G. Cambridge, United States District Judge for the District of Nebraska, acting on the recommendation of United States Magistrate Judge Kathleen A. Jaudzemis.

payments to the private landlords in an amount calculated to make up the difference between the tenant's contribution and a contract rent initially agreed upon by the landlord and HUD.

The relevant statute provided that the initial contract rents would be adjusted at least annually "to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula." 42 U.S.C.A. § 1437f(c)(2)(A). The statute also charged that adjustments in the contract rent could "not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary." 42 U.S.C.A. § 1437f(c)(2)(C) (1982) (amended 1989). Accordingly, the contracts provided that rental adjustments would be made through Automatic Annual Adjustment Factors ("AAAFs") published in the Federal Register. But the contracts also provided that "[n]ot withstanding [sic] any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government[.]" *See, e.g.*, J.A., vol. 2, p. 194, Housing Assistance Payments Contract § 1.8d (this clause appears as § 1.9d in many Section 8 contracts).

From 1974 to 1981, HUD made rental adjustments according to the AAAFs. In 1981, HUD suspected that AAAF-adjusted assistance payments to some landlords were excessive, and began to conduct "comparability studies" in certain real estate markets where it believed that the subsidies, adjusted upward by the automatic adjustment factors, resulted in rents materially higher

than market rents. In these studies, HUD personnel selected several comparable apartment buildings and compared their unassisted rents with the rents in the Section 8 building. The comparable rents were used to limit the rent payments HUD would make under the contract.

In 1989, in response to litigation over AAAFs and comparability studies, Congress amended Section 8 to provide explicitly that HUD could limit automatic rent adjustments through the use of comparability studies, but required HUD to write and publish administrative regulations for conducting such studies in the future. *See* Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub.L. No. 101-235, 103 Stat. 1987 (codified at 42 U.S.C.A. § 1437f). Congress also gave the landlords a portion of what they might have received if they had been entitled to AAAFs, and designated this scheme as the "exclusive method" for resolving past Section 8 rent subsidy disputes. *See* 42 U.S.C.A. § 1437f note.

After Congress passed Section 801, some landlords brought suit, alleging that the Congressional amendments violated the due process Clause of the Fifth Amendment by stripping them of their vested rights to annual contract rent increases based on the AAAFs alone. In *Cisneros v. Alpine Ridge Group*, 113 S. Ct. 1898, 123 L. Ed.2d 572 (1993), the Supreme Court concluded that the assistance contracts themselves permit comparability studies because they recognize that landlords are not entitled to rents in excess of going market rates, regardless of what rents the application of AAAFs might generate. The Supreme Court concluded:

> In sum, we think that the contract language is plain that no project owner may claim entitlement to formula-based rent adjustments that materially exceed market rents for comparable units. We also think it clear that § 1.9d – which by its own terms clearly envisions some comparison "between the rents charged for assisted and comparable unassisted units" – affords the Secretary sufficient discretion to design and implement comparability studies as a reasonable means of effectuating its mandate. In this regard, we observe that § 1.9d expressly assigns to "the Government" the determination of whether there exist material differences between the rents charged for assisted and comparable unassisted units. Because we find that respondents have no contract right to unobstructed formula-based rent adjustments, we have no occasion to consider whether § 801 of the Reform Act unconstitutionally abrogated such a right.

Cisneros, 113 S. Ct. at 1904-05.

The instant suit was filed as a class action seeking a declaratory judgment on behalf of numerous Section 8 landlords that they had suffered a due-process violation and were entitled to AAAF-adjusted rents. The district court stayed the action pending the Supreme Court's decision in *Cisneros*. After the stay was lifted, the government moved for summary judgment. In light of *Cisneros*, the district court concluded that the landlords lacked the necessary property right – an unqualified right to the AAAFs – that would enable them to proceed with a due-process challenge to Section 801 and the effects of the comparability studies.

II.

The landlords' argument that they are entitled to AAAF-adjusted rents comprises three steps: (1) HUD's attempt to execute comparability studies violated their right to procedural due process because HUD did not create nationwide standards for implementing such studies; (2) because the comparability studies violated constitutional standards, plaintiffs' right to AAAFs became vested since AAAFs were the "presumptive" method of calculating rents under their contracts; (3) Section 801 therefore unconstitutionally abrogated plaintiffs' vested contract right to AAAFs by providing an "exclusive remedy" for disputes over AAFs and comparability studies. Simply put, the landlords believe that if they discredit the studies, they should receive the AAAFs.

Before a litigant can prevail on a claim alleging a due-process deprivation of a property right, he must first show an entitlement to the property right. *See Carolan v. Kansas City*, 813 F.2d 178, 181 (8th Cir. 1987). Here, the landlords failed to prove that they had a vested property right to the AAAFs as the "presumptive method" of adjusting rents. The contention that AAAFs are the presumptive method of adjusting rents is incorrect by the terms of the contracts. While AAAFs might be the norm for practical reasons, the overriding principle set forth in the contracts is that "[AAAFs] shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government[.]" Because of this contractual clause, "no project owner may claim entitlement to formula-based rent

adjustments that materially exceed market rents for comparable units." *Cisneros*, 113 S. Ct. at 1904. HUD's discretion to make rental comparisons and rent adjustments under the contracts prevented AAAFs from ever becoming a property right vested in landlords whose rents were materially different from comparable unassisted units. Only where AAAF-adjusted rents did not result in material differences between assisted and comparable unassisted units may the right to AAAFs vest in any particular landlord. The landlords have argued for an AAAF increase without a showing on the issue of comparability. Their attempt to cast doubt upon the studies does not entitle them to AAAFs, since the remedy for an improper study is simply a better study. Because we have determined that the right to AAAFs never vested under the terms of the contracts, we need not reach the constitutional issue of whether the landlords were deprived of procedural due process when HUD conducted the comparability studies. *See Cisneros*, 113 S. Ct. at 1905.

The Intervenors, other landlords who joined in the action, base a similar argument on a somewhat different premise. They maintain that rulemaking procedures under the Administrative Procedures Act ("APA") were required before HUD could perform comparability studies, and that, as a result of HUD's failure to abide by the APA, the comparability studies are invalid and the landlords are entitled to AAAFs instead. We do not see how a failure to follow APA procedures could have given rise to a property right to AAAFs unqualified by comparable local rents, a result necessarily contrary to the contracts, the statute, and *Cisneros*. The statute and the contracts define the property right before us, not the

APA. Even if the APA were otherwise applicable in the circumstances of this case, Congress has provided an "exclusive remedy" for disputes over comparability studies in Section 801, which we must regard as more recent and more specific statutory guidance than the APA.

III.

For the foregoing reasons we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT CCURT
FOR THE DISTRICT OF NEBRASKA

FEDERAL HOUSING PARTNERS IV LIMITED PARTNERSHIP, an Iowa Limited Partnership, et al., Plaintiffs, vs. HENRY G. CISNEROS, et al., Defendants.	8:CV89-812 JUDGMENT (Filed Feb. 22, 1994)

In accordance with the memorandum and order entered herein on January 3, 1994,

IT IS ORDERED that this action is dismissed with prejudice.

DATED this 22 day of February, 1994.

BY THE COURT:

/s/ William G. Cambridge
William G. Cambridge
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FEDERAL HOUSING PARTNERS IV LIMITED PARTNERSHIP, an Iowa Limited Partnership, et al., Plaintiffs, vs. HENRY G. CISNEROS, et al., Defendants.	8:CV89-812 MEMORANDUM OPINION AND ORDER (Filed Jan. 3, 1994)

This matter is before the court on the plaintiffs' objections, (Filing No. 160), to the Magistrate Judge's report and recommendation, (Filing No. 161).

Pursuant to 28 U.S.C. § 636(b)(1) and NELR 72.4, this Court has conducted a *de novo* review of the portions of the Magistrate Judge's findings and recommendations to which objections have been made. The Court concludes that the Magistrate Judge's report and recommendation is consistent with the evidence and the law and should therefore be adopted.

This is a declaratory judgment action brought pursuant to 28 U.S.C. § 2201. The plaintiffs are landlords participating in a government program to provide housing for low income people, under 42 U.S.C. §§ 1437-1437j, (section 8 of the United States Housing Act of 1937).

The plaintiffs argue that the method used by the Department of Housing and Urban Development ("HUD") to adjust the amount of financial assistance

HUD pays to the landlords was arbitrarily and inconsistently applied and resulted in a lesser amount of payment. Until 1981, HUD calculated the Housing Assistance Payments ("HAP") based on a percentage adjustment based on various market trends in a given geographical area, called Automatic Annual Adjustment Factors ("AAAF"). In 1981, HUD began using comparability studies which compared the rental rates of section 8 properties with similar properties in the market area. Congress enacted section 801(a) of the HUD Reform Act of 1989, which amended 42 U.S.C. § 1437f(c)(2)(A), and authorized HUD to use comparability studies according to clear and published guidelines. Section 801 also allowed HUD to make retroactive adjustments to landlords whose rent had been reduced by the comparability studies before the guidelines. The plaintiffs allege that section 801 unconstitutionally deprives them of their vested property rights by retroactively authorizing comparability studies.

Magistrate Judge Jaudzemis concluded that the recent United States Supreme Court decision in *Cisneros v. Alpine Ridge Group*, 508 U.S. ___, 113 S. Ct. 1898, 123 L. Ed. 2d 572 (1993), disposed of this case and the Court agrees. The Court in *Cisneros*, found that the plaintiffs had no "entitlement to formula-based rent adjustments" or AAAF's. *Id.* ___, 113 S. Ct. at ___, 123 L. Ed. 2d at 582. Because the plaintiffs have no contractual right to the AAAF's, a statute cannot unconstitutionally deny them that right. The Court finds that the report and recommendation should be adopted.

IT IS ORDERED:

1. The Magistrate Judge's report and recommendation, (Filing No. 160), is adopted;

2. The plaintiffs' objections, (Filing No. 161), are overruled; and

3. This action is dismissed.

DATED this 3rd day of January, 1994.

BY THE COURT:

/s/ William G. Cambridge
William G. Cambridge
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FEDERAL HOUSING PARTNERS IV LIMITED PARTNERSHIP, an Iowa Limited Partnership, *et al.*, Plaintiffs, vs. HENRY G. CISNEROS, *et al.*, Defendants.	8:CV 89-00812 **REPORT and RECOMMENDATION** (Filed Sept. 29, 1993)

THIS MATTER is before me pursuant to 28 U.S.C. § 636 and the general order reassignment.

THIS MATTER is before the Court upon the defendant's motion (Filing No. 154) for summary judgment, and the plaintiffs' motion for oral argument on the matter (Filing No. 156). For the reasons set out below, the Court recommends that summary judgment be granted, that the request for oral argument be denied, and that this matter be dismissed.

BACKGROUND

This is an action for declaratory judgment, brought pursuant to 28 U.S.C. § 2201, with this Court having federal question jurisdiction pursuant to 28 U.S.C. § 1331. The plaintiffs are various landlords participating in Section 8 of the United States Housing Act of 1937 (42 U.S.C.

§§ 1437 - 1437j), a program intended to provide housing for low-income people.[1]

At issue is the method utilized by the United States Department of Housing and Urban Development ("HUD") to adjust the amount of financial assistance (known as "Housing Assistance Payments" or "HAP") provided by HUD to the landlords. Section 8(c)(2)(A) of the Act (42 U.S.C. § 1437f(c)(2)(A)) provides for periodic adjustment of the HAP "to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula." It is uncontroverted that from the program's inception until 1981 HUD computed HAPs on the basis of Automatic Annual Adjustment Factors ("AAAFs"), a percentage adjustment based upon various market trends in a given geographical area. However, in 1981 HUD began relying upon a different method of computation, known as "comparability studies", which consist of comparisons of specific Section 8 properties with the rental rates of other properties in the market area that HUD considered to be comparable to the Section 8 properties. The plaintiffs allege that this new method was applied arbitrarily and inconsistently, and generally resulted in lower HAPs (Filing No. 12 at 29, ¶¶ 92-95).

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[1] In November of 1991 this Court certified this action as a class action, such class consisting, with designated exceptions, "all persons or entities who own rental housing projects constructed or substantially rehabilitated under Section 8 of the National Housing Act" (Filing No. 78). In July of 1993 additional unnamed designated party-plaintiffs were allowed to intervene. (Filing No. 152).

In 1989 Congress enacted Section 801(a) of the HUD Reform Act of 1989, 103 Stat. 2057, which amended 42 U.S.C. § 1437f(c)(2)(A) to expressly authorize HUD to utilize comparability studies, providing that such studies are performed according to clear and published guidelines. Section 801 also directed HUD to make retroactive adjustments to any landlords who had had their rent reduced by previous comparability studies that had been performed without the benefit of such guidelines. At least partially in response to the amended law, HUD ceased utilizing comparability studies, and has no plans to use them in the near future. (Filing No. 159, Exhibit "1", *Declaration of James J. Tahash, Director of Planning and Procedure Division, HUD*). The plaintiffs, however, allege that § 801, by attempting to retroactively authorize the comparability studies, is an unconstitutional deprivation of their vested property rights.

This action was stayed in April of 1992, pending resolution by the United States Supreme Court of an appeal of a 9th Circuit decision, ***Alpine Ridge Group v. Kemp,*** 955 F.2d 1382 (9th Cir. 1992). (Filing No.120). In ***Alpine Ridge*** the 9th Circuit had held that HUD was prohibited from utilizing the comparability studies, and that § 801 was an unconstitutional abrogation of the landlord's vested property rights. 955 F.2d at 1388.

The United States Supreme Court ultimately reversed the 9th Circuit in ***Cisneros v. Alpine Ridge Group,*** 508 U.S. ___, 113 S.Ct. 1898, 123 L.Ed.2d 572 (1993). The stay was lifted (Filing No. 150), and the motion for summary judgment followed.

DISCUSSION

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party should prevail as a matter of law. F.R.Civ.P. 56(c); ***Celotex Corp. v. Catrett,*** 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Upon review of a motion for summary judgment, this Court must give the party opposing the motion the benefit of all favorable factual inferences. *Holloway v. Lockhart,* 813 F.2d 874, 878 (8th Cir. 1987).

1. NO GENUINE ISSUES OF MATERIAL FACT REMAIN

The plaintiffs assert that summary judgment would be inappropriate because issues of fact remain as to the standards utilized in HUD's comparability studies. *Plaintiff's Brief in Opposition* at 17. While it is uncontroverted that numerous issues of fact do remain with regard to the comparability studies, whether the existence of such issues precludes summary judgment depends upon whether those issues of fact are material to resolution of this action. This Court holds, as further explained below, that they are not material.

The plaintiffs argue that those issues go to the issue of the constitutionality of Section 801. They point out that the Supreme Court did not explicitly address the constitutionality issue when it reversed the 9th Circuit. *See* ***Alpine Ridge,*** 508 U.S. at ___, 113 S.Ct. at 1905. The plaintiffs therefore argue that issues regarding the quality of the comparability studies are material with regard to the question of whether their utilization results in an unconstitutional taking.

This Court takes a different view. In explaining its holding, the Supreme Court expressly rejected the relevance of such issues, noting that:

> At bottom many of respondent's arguments in support of the decision below seem to circle back to their vigorous contention that HUD's comparability studies have been poorly conceived and executed, resulting in faulty and misleading comparisons. *But the integrity with which the agency has carried out its comparability studies is an entirely different matter from its contractual authority to employ such studies at all.* Even if it could be demonstrated that HUD's studies have been unreliable, this would in no way suggest that the contract forbids HUD from capping rents based on accurate and fair comparability studies. *If respondents have been denied formula-based rent increases based on shoddy comparisons, their remedy is to challenge that particular study, not to deny HUD's authority to make comparisons.*
>
> In sum, we think that the contract language is plain that *no project owner may claim entitlement to formula-based rent adjustments that materially exceed market rents for comparable units. . . .* Because *we find that respondents have no contract right* to unobstructed formula-based rent adjustments, we have no occasion to consider whether § 801 . . . unconstitutionally abrogated such a right.

508 U.S. at ___, 113 S.Ct. at 1904 (emphasis added). Accordingly, the issues going to the accuracy of the comparability studies, while genuine, are not material to the question of the constitutionality of § 801.

2. DEFENDANTS ARE ENTITLED TO PREVAIL AS A MATTER OF LAW

The plaintiffs concede that § 801, if constitutional, resolves their claims. *See Plaintiffs' Brief in Opposition* of 9/10/93 at 17 ("HUD . . . argues that Section 801 resolves plaintiffs claims *and of course it does.* But inasmuch as it resolves those claims by abrogating vested property rights, Section 801 is unconstitutional") (emphasis added). The plaintiffs could not argue otherwise; it is well established that when intervening legislation resolves a controversy involving declaratory relief, the controversy becomes moot. *See, e.g.,* ***Lewis v. Continental Bank Group,*** 494 U.S. 472, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1989) (intervening legislation renders case moot) *and* ***Department of Justice v. Provenzano,*** 469 U.S. 14, 15, 105 S.Ct. 413, 414, 83 L.Ed.2d 242 (1984) ("The new legislation . . . plainly renders moot the single issue. . . . That issue is no longer alive because, however this Court were to decide the issue, our decision would not affect the rights of the parties").

The Supreme Court's holding that the plaintiffs have no right to formula-based rent adjustments, e.g., AAAFs, necessarily precludes any due process challenge to § 801. "The preliminary question in any due process analysis is whether the party challenging the statute has a property interest that that statute protects." ***Carolan v. Kansas City,*** 813 F.2d 178, 181 (8th Cir. 1987). What constitutes a property interest was set out in ***Board of Regents v. Roth,*** 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972):

> To have a property interest in a benefit, a person must have more than an abstract need or desire for it. He must instead have a legitimate claim of entitlement to it . . . Property interests are not . . . created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source . . .

Without a contractual right to the AAAFs, the plaintiffs cannot complain that a statute has unconstitutionally denied them that right. "Where liberty interests are not implicated, a procedural due process claim can survive summary judgment only if it is based upon a property interest encompassed by the Fourteenth Amendment." ***West Washington County Emergency Medical Services v. Washington County,*** 967 F.2d 1252, 1254 (8th Cir. 1992). *Compare* ***Hysaw v. Washburn University of Topeka,*** 690 F.Supp. 940 (D. Kan. 1987), in which the district court denied summary judgment on issue of whether plaintiffs were denied scholarship funds, where the plaintiffs had shown a contractual right to such funds, but granted summary judgment on the issue of the plaintiffs' right to play college athletics, where such right was not contractually provided. In so holding the Court noted that "[o]nly after a protectable property interest has been established do we then determine whether due process was afforded." *Id.* at 944 (*citing* ***Roth***).

There being no genuine issues of material fact in this matter, and the defendants being entitled to prevail as a matter of law, the motion for summary judgment should be granted, and this matter dismissed.

RECOMMENDATION

Accordingly, it is my recommendation that

(1) the plaintiffs' motion for oral argument (Filing No. 156) be denied;

(2) the defendants' motion for summary judgment (Filing No. 154) be granted; and

(3) this action be dismissed.

Any objection to this recommendation pursuant to NELR 72.4 shall be filed with the Clerk of the Court within ten (10) days after having been served with a copy of this recommendation. The brief in support of the objection shall be delivered to United States District Judge William G. Cambridge at the time of the filing of such objection. Failure to submit a brief in support of the objection may be deemed an abandonment of the objection.

DATED this 29th day of September, 1993.

BY THE COURT:

/s/ Kathleen A. Jaudzemis
KATHLEEN A. JAUDZEMIS
United States Magistrate
Judge

APPENDIX E

Sec. 801. ANNUAL ADJUSTMENT FACTORS FOR SECTION 8 RENTS.

(A) Effect of Prior Comparability Studies. –

(1) IN GENERAL. – In any case in which, in implementing section 8(c)(2) of the United States Housing Act of 1937 –

> (A) the use of comparability studies by the Secretary of Housing and Urban Development or the appropriate State agency as an independent limitation on the amount of rental adjustments resulting from the application of an annual adjustment factor under such section has resulted in the reduction of the maximum monthly rent for units covered by the contract or the failure to increase such contract rent to the full amount otherwise permitted under the annual adjustment factor, or
>
> (B) an assistance contract requires a project owner to make a request before becoming eligible for a rent adjustment under the annual adjustment factor and the project owner certifies that such a request was not made because of anticipated negative adjustment to the project rents,

for fiscal year 1980, and annually thereafter until regulations implementing this section take effect, rental adjustments shall be calculated as an amount equal to the annual adjustment factor multiplied by a figure equal to the contract rent minus the amount of contract rent attributable to debt service. Upon the request of the project owner, the Secretary shall pay to the project owner the

amount, if any, by which the total rental adjustment calculated under the preceding sentence exceeds the total adjustments the Secretary or appropriate State agency actually approved, except that solely for purposes of calculating retroactive payments under this subsection, in no event shall any project owner be paid an amount less than 30 percent of a figure equal to the aggregate of the annual adjustment factor multiplied by the full contract rent for each year on or after fiscal year 1980, minus the sum of the rental payments the Secretary or appropriate State agency actually approved for those years. The method provided by this subsection shall be the exclusive method by which retroactive payments, whether or not requested, may be made for projects subject to this subsection for the period from fiscal year 1980 until the regulations issued under subsection (e) take effect. For purposes of this paragraph, "debt service" shall include interest, principal, and mortgage insurance premium if any.